

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

DUANE ZIEMBA :
 :
 :
 V. : CIV. NO. 3:98CV2344 (JCH)
 :
 JOHN ARMSTRONG, ET AL :
 :
 :

RULING and SCHEDULING ORDER

A telephone conference was held on February 24, 2004, to discuss the pending motions. After discussion, the Court ruled as follows.

Plaintiff's Motion for Late Disclosure of Expert Witness
[Doc. #221]

The Court informed that parties that Judge Hall ruled on this motion on December 5, 2003. [Doc. #237]. Judge Hall will issue an endorsement ruling terminating the motion.

Plaintiff's Motion for Protective Order Concerning Mental Examination
[Doc. #249]

Plaintiff moves for a protective order allowing his counsel or their representative to attend any Rule 35 psychological examination conducted on the plaintiff by employees or agents of the Department of Correction. In the alternative, plaintiff moves for a protective order allowing a court reporter to record the examination for later

review by his counsel.

Plaintiff states he has "real cause to be concerned about the fairness of the examination, the bias of the examiners and the examiner's possible ulterior motives to conduct the examination unfairly or to stray into the merits of the case for purposes of building a record for improper use at trial." [Doc.#249 at 3-4]. Plaintiff argues that defendants' proposed examiners, NCCI Psychologist Paul Chaplin and the DOC's Director of Mental Health Services Suzanne Ducate, are: (1) current employees of the Department of Correction; (2) clients of the Attorney General's Office; (3) colleagues of the defendants in this case; (4) persons with past and ongoing treatment and supervisory responsibilities for the plaintiff, and; (5) persons about whose psychiatric care the plaintiff has complained in the past. Id. at 3. Defendants do not dispute these facts.

Plaintiff is concerned, "given the examiner's extremely close ties to the defendants and their counsel and the examiner's own prior treatment contact with the plaintiff, that they have already formed an opinion about the plaintiff's mental state, and that the "examination" is merely the defendants' attempt to cloak this already-formed opinion with a veneer of fairness and neutrality." Id. at 4. He requests that plaintiff's counsel or representative attend the examination or, in the alternative, that a court reporter

record the examination. Id.

The Court asked that defendants' counsel to find out if there is a room with a one-way mirror at any appropriate DOC facility that would permit unobtrusive observation of plaintiff's mental health examination. Defendants' counsel will report back to Court on or before Tuesday, March 2, 2004.¹

Plaintiff's Motion for Protective Order Concerning Defendants' Deposition of Plaintiff's Expert Witness [Doc. #250]

Plaintiff moves for a protective order barring the deposition or, in the alternative, allowing the deposition only upon the defendants' agreement to pay Dr. Granacher's stated rate for his preparation and testimony. For the reasons that follow, plaintiff's Motion for Protective Order [**Doc. #250**] is **DENIED**.

The deposition of plaintiff's expert witness, Dr. Granacher, has been noticed for March 8, 2004 at 3:00 p.m. at the doctor's office in Lexington, KY. Defendant objects to paying Dr. Granacher's rate of \$750 per hour.

Plaintiff argues it "would be unfair to demand that a physician with Dr. Granacher's credentials take a lesser rate than the rate he customarily charges. And it would be equally unfair to insist that

¹Counsel for defendant Mangiafico declined to file responsive papers but participated in arguing this motion during the conference call.

the plaintiff's court-appointed counsel pay part of the fee, especially since they are already paying Dr. Granacher's full fees for his records review, expert report preparation and trial testimony." [Doc. #250 at 9].

During the conference, the Court advised the parties to hold the March 8 deposition date and asked defendants to file their response on February 25, 2004 on an expedited basis. Defendants state that they do not "seek to avoid their obligation to pay Dr. Granacher for his time." Rather, they assert that the doctor's proposed fee of \$750 per hour is not reasonable pursuant to Fed. R. Civ. P. 26(b)(4)(C). They seek leave to conduct the deposition and ask the Court to defer ruling on the reasonableness of the rate until the parties have had the opportunity to depose Dr. Granacher and make inquiry into the factors set forth in Coleman v. Dydula, 190 F.R.D. 320, 324 (W.D.N.Y. 1999). The Court agrees.

Rule 26(b)(4) provides:

(4) Trial Preparation: Experts.

(A) A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If a report from the expert is required under subdivision (a)(2)(B), the deposition shall not be conducted until after the report is provided.

(B) A party may, through interrogatories or by deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a

witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means. (C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under this subdivision; and (ii) with respect to discovery obtained under subdivision (b)(4)(B) of this rule the court shall require the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

Fed. R. Civ. P. 26(b)(4).

In Coleman v. Dydula, the court set forth the following factors for determining a "reasonable fee."

In determining what constitutes a "reasonable fee" under Rule 26(b)(4)(C), federal district courts have considered such factors as (1) the witness's area of expertise, (2) the education and training that is required to provide the expert insight that is sought, (3) the prevailing rates for other comparably respected available experts, (4) the nature, quality and complexity of the discovery responses provided, (5) the cost of living in the particular geographic area, (6) the fee being charged by the expert to the party who retained him, (7) fees traditionally charged by the expert on related matters, and (8) any other factor likely to be of assistance to the court in balancing the interests implicated by Rule 26.

Coleman, 190 F.R.D. at 324 (citing Mathis v. NYNEX, 165 F.R.D. 23, 24-25 (E.D.N.Y. 1996); U.S. Energy Corp. v. NUKEM, Inc., 163 F.R.D. 344, 345-46 (D. Colo. 1995)).

At the conference, plaintiff agreed to ask Dr. Granacher how many hours he will be available to testify on March 8, 2004 and report back to the defendants. If an issue arises regarding the doctor's availability, the parties should contact the Court for a conference.

Accordingly, plaintiff's Motion for Protective Order Concerning Defendants' Deposition of Plaintiff's Expert Witness [**Doc. #250**] is **DENIED** on the current record. The Court defers ruling on the reasonableness of the fee until after Dr. Granacher is deposed. The parties will endeavor to agree on a reasonable fee. However, if no agreement is reached the parties shall file a

motion to determine a reasonable fee for plaintiff's expert.

SO ORDERED at Bridgeport this 27th day of February 2004.

_____/s/_____
HOLLY B. FITZSIMMONS
UNITED STATES MAGISTRATE JUDGE